No. 11,007

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA, *Appellant,*
vs.
ONE PLYMOUTH TRUCK, 7 BOXES OF LEMONS 307 LBS. GROSS, 2 BOXES GRAPEFRUIT 92 LBS. GROSS, 10 CASES CANNED MILK, 48 CANS EACH, "PET" AND "CARNATION" BRANDS, *Respondents-Appellees,*
MIGUEL MORACHIS, *Claimant-Appellee.*

Upon Appeal from the District Court of the United States for the District of Arizona.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

FRANK E. FLYNN,
United States Attorney,
JOHN P. DOUGHERTY,
Assistant United States Attorney,
LEAVENWORTH COLBY,
Attorney, Department of Justice,
Attorneys for the United States, Appellant.

Subject Index

Page

Contentions of the parties 1

Argument 4

I. The condemnation and forfeiture of all property seized for violation of the Act is provided without exception by its plain general language..... 4

II. The legislative history of the Act shows it was intended to provide for the forfeiture of vehicles containing articles being unlawfully exported..... 10

III. Nothing in the Act limits or restricts its plain general language so as to exclude from forfeiture the vehicles containing the articles being exported..... 16

Conclusion 22

Table of Authorities Cited

Cases: Pages

Cachalot III, 60 F. Supp. 527 ..... 3, 4, 20
Jones v. Guaranty Co., 101 U. S. 622 20
United States v. Fisher, 2 Cranch 358..... 20
United States v. Hill, 34 F. (2d) 133..... 16
United States v. Manstad, 134 F. (2d) 986..... 20
United States v. One Ford Coach, 307 U. S. 219..... 21

Statutes:

Act of January 9, 1809, c. 5, 2 Stat. 506..... 8
Act of December 17, 1813, c. 1, 3 Stat. 89..... 8
Act of February 4, 1815, c. 31, 3 Stat. 196..... 8
Espionage Act of 1917, Title VI, 40 Stat. 223.....
.....4, 5, 6, 7, 9, 10, 11, 16, 18, 21

Miscellaneous:

Text as of February 8, 1917 (54 Cong. Rec. 3416).... 11
Text as of April 18, 1917 (55 Cong. Rec. 794).....13, 14

No. 11,007

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA, *Appellant,*
vs.
ONE PLYMOUTH TRUCK, 7 BOXES OF LEMONS 307 LBS. GROSS, 2 BOXES GRAPEFRUIT 92 LBS. GROSS, 10 CASES CANNED MILK, 48 CANS EACH, "PET" AND "CARNATION" BRANDS, *Respondents-Appellees,*
MIGUEL MORACHIS, *Claimant-Appellee.*

Upon Appeal from the District Court of the United States for the District of Arizona.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

CONTENTIONS OF THE PARTIES.

In the light of the appellee's arguments, it appears that a single basic question is presented by this appeal:

Whether or not the plain language of the Espionage Act of 1917, directing that the court shall decide whether the property seized for violation of the Act

shall be condemned and forfeited to the United States or shall be released and restored, is limited and restricted in some way by the last sentence of Section 1, which contains a special provision added in the course of the consideration of the Act by Congress and providing for the forfeiture of property found merely to appear to have been about to be unlawfully taken out of the United States.

The contention of the United States is that Congress in adding this special provision for the forfeiture of property found to appear to have been about to be unlawfully taken out did not intend to restrict the Act but intended to leave unaffected the Act's general provisions for condemnation and forfeiture of vehicles or vessels seized as containing articles about to be unlawfully taken out as well as all other property seized for violation of the Act. The contention of the appellee, on the other hand, is that this added special provision indicates an intention by Congress to restrict the general language of the Act and confine forfeiture to the single situation of articles appearing to be about to be exported. In appellee's own language (Br. 5):

> Congress never intended that the vehicles be forfeited; for the whole purpose of Congress was to control ocean-going vessels and attempted unlawful exports of articles in said vessels. The vessels were to be seized and detained and not unnecessarily delayed * * * and the articles, but not the vessels, forfeited. Maritime traffic alone was considered by Congress, unique border traffic in time of war was not considered at all.

In support of appellee's contention the only arguments advanced are (1) that other statutes providing for forfeitures have done so in what seems to appellee's counsel to constitute more express and specific language than that employed in this Act (Br. 9-11); (2) that "in 1917 the truck was not in general use" and "border crossing by trucks was not contemplated by Congress" and so Congress must not have intended to cover them (Br. 11, 13); and in conclusion, (3) that the practice, uniformly followed prior to this present case, of forfeiting the vehicles employed in exportation, should be disregarded since the point now at issue on this appeal cannot be shown to have been specifically raised (Br. 16).[1]

In support of the Government's contention, counsel for the United States submit (1) that the condemnation and forfeiture of all property seized for violation of the Act is provided without exception by its plain general language; (2) that the legislative history of the Act clearly shows that both its general language and the special provision added by the last sentence of Section 1 were intended to provide for the condemnation and forfeiture of the vehicles containing articles

[1]Subsequent to the taking of the present appeal the position of the court below was brought to the attention of the District Court for the Southern District of Florida, in a case where the United States had already acquiesced in the report of the Commissioner recommending that the vessel be released under the proviso of Section 5. The question could not affect the result and was not exhaustively briefed and argued. That Court, however, agreed with the court below in this case. *The Cachalot III*, 60 F. Supp. 527, 529. No appeal was attempted since the Government agreed the vessel should be released under Section 5 and there was accordingly doubt as to its appealability.

being exported as well as of the articles themselves; and (3) that nothing in the Act requires it to be so limited or restricted as to exclude from forfeiture vehicles or vessels which are themselves unlawfully taken out of the United States while containing articles being exported.

ARGUMENT.

I.

THE CONDEMNATION AND FORFEITURE OF ALL PROPERTY SEIZED FOR VIOLATION OF THE ACT IS PROVIDED WITHOUT EXCEPTION BY ITS PLAIN GENERAL LANGUAGE.

In view of appellee's contention that the Act is absolutely silent with respect to the forfeiture of vehicles involved in its violation (Br. 11), we take the liberty of setting forth the pertinent clauses of the Act's plain general provisions which the United States contends are fully dispositive of this case. Appellee's statement, based apparently upon its construction of the last sentence of Section 1,[2] is diametrically opposed to the Government's position that these provisions fully authorize the condemnation and forfeiture of the vehicle

---

[2]It appears probable, although appellee nowhere so states, that this statement is based upon the contention that the last sentence of Section 1 of the Espionage Act (22 U.S.C. 401) contains the Act's only provision for condemnation and forfeiture. This position, which is untenable in the light of the Act's legislative history as well as of the plain meaning of its general provisions, was expressly adopted by Judge Holland in *The Cachalot III*, 60 F. Supp. at 529. The Court below adopted a more conservative position and merely concluded that the Act "does not authorize forfeiture of a vehicle containing articles about to be unlawfully exported" (R. 14).

subject to the court's discretion to order it restored upon the giving of a bond against its employment in further violations.

Section 1 (40 Stat. 223-224; 22 U.S.C. 401) provides for the seizure of articles being unlawfully exported and the vehicles containing the same. The pertinent language, with emphasis supplied, is:

> Whenever an attempt is made to export or ship from or take out of the United States, any arms or munitions of war, or other articles, in violation of law, or whenever there shall be known or probable cause to believe that any such arms or munitions of war, or other articles, are being or are intended to be exported, or shipped from, or taken out of the United States, in violation of law, * * * [the persons authorized by the Act] may seize and detain any articles or munitions of war about to be exported or shipped from, or taken out of the United States, in violation of law, *and the vessels or vehicles containing the same,* and retain possession thereof *until released or disposed of as hereinafter directed.*

Section 3 (40 Stat. 224, 22 U.S.C. 403) provides how, in the event the owner makes a claim for restoration, the Court shall hear and decide whether the property seized shall be condemned and forfeited to the United States or restored to the claimant. It should be noted that it lumps all seized property together and does not distinguish nor except from forfeiture the vehicles or vessels seized as containing the articles being exported. With emphasis supplied, the language pertinent is:

> The owner or claimant *of any property seized* under this title may, at any time before condemnation proceedings have been instituted, as hereinafter provided, file his petition for its restoration * * * whereupon the court * * * after causing notice to be given to the United States Attorney for the district and to the person making the seizure, shall proceed to hear and decide *whether the property seized shall be restored to the petitioner or forfeited to the United States.*

Section 4 (45 Stat. 1423-1424; 22 U.S.C. 404; cf. 40 Stat. 224), provides how, upon the filing of a libel for condemnation of the property seized, the Court shall hear and decide whether the property shall be condemned and forfeited. Again, it must be noted, all the property seized is lumped together and no exception or distinction is made of the vehicles or vessels seized as containing the articles to be exported. The pertinent language, with emphasis supplied, reads:

> Whenever the person making *any seizure* under this title applies for and obtains a warrant for the detention *of the property* and (a) upon the hearing and determination of the petition of the owner or claimant restoration is denied, or (b) the owner or claimant fails to file a petition for restoration * * * the United States Attorney for the district wherein it was seized, upon the direction of the Attorney General, shall institute libel proceedings * * * *against the property* for condemnation; and *if*, after trial and hearing of the issues involved, *the property is condemned, it shall be disposed of by sale,* and the proceeds thereof, less the legal costs and charges, paid into the Treasury. * * *

Section 5 (40 Stat. 225; 22 U.S.C. 405), after providing that the proceedings should follow those on the admiralty side of the court, authorizes the court to release and restore the property upon the giving of a bond against its further unlawful employment as an instrumentality for violation of the Act. With emphasis supplied to the pertinent language, it reads:

> *Provided;* That upon the payment of the costs and legal expenses of both the summary trials and the libel proceedings herein provided for, and the execution and delivery of a good and sufficient bond in an amount double the value *of the property seized,* conditioned that it will not be exported or *used or employed* contrary to the provision of this title, the court, in its discretion, may direct that it be delivered to the owners thereof or to the claimants thereof.

And here again is further indubitable proof that Congress had in mind the forfeiture of the vehicles or vessels employed and seized as instruments of the contraband traffic. The condition of the bond that the property will not be "*used or employed* contrary to the provisions of this Act" can apply only to further use of the vehicle or vessel as the instrumentality of the unlawful traffic.

It is thus abundantly plain that the instant case may not be regarded as involving the silence of Congress or its failure to make any provision for condemnation and forfeiture of vehicles or vessels seized while about to be taken out of the United States containi
es which are themselves being unlawfully exported. It

is rather a question of whether general language plainly providing for condemnation and forfeiture has been limited or restricted in some manner by the effect of other language found within the four corners of the Act.

Nor is there anything novel in providing for the condemnation and forfeiture of vehicles or vessels which are the mere instrumentality of violation. The general policy of forfeiting the vehicle or vessel employed in violating embargo and non-intercourse laws was established almost from the foundation of the Republic and has always been regarded as necessary to their effective enforcement. Several early and familiar examples may illustrate the practice. Section 1 of the Act of January 9, 1809, c. 5, 2 Stat. 506, provided that for the violation of the Act "all such specie, goods, wares and merchandise, and also the ship, vessel, boat, water craft, cart, wagon, sled, or other carriage or vehicle, on board, or in which the same may be so put, placed, or loaded as aforesaid, shall be forfeited." Section 2 of the Act of December 17, 1813, c. 1, 3 Stat. 89, similarly provided that "all such specie, goods, wares, merchandise, produce, provisions, naval or military stores, livestock, and also the ship, vessel, boat, watercraft, cart, wagon, sled, or other carriage or vehicles, on board, or on or in which the same may be so put, placed, or loaded as aforesaid, and also all horses, mules, and oxen, used or employed in conveying the same, shall be forfeited." Section 3 of the Act of February 4, 1815 c. 31, 3 Stat. 196, likewise directed that "such naval or military

stores, arms, or the munitions of war, cattle, livestock, articles of provisions, cotton, tobacco, goods, money, or other supplies, together with the carriage or wagon, cart, sleigh, vessel, boat, raft, or vehicle of whatsoever kind, or horse, or other beast, by which they, or any of them are transported, or attempted to be transported, shall be forfeited."

Far from the border traffic by means of vehicles being, as appellee argues, new and unique or outside the ambit of Congressional intent, it has always been recognized as present and requiring specific provision as in the Act of 1917. If anything is new, it is the conception of the vehicle itself as an article of contraband exportation. It seems unlikely that the vehicle itself was ever, until the development of the motor car, more than a mere instrumentality of the illegal traffic. But provision for the forfeiture of the vehicle or vessel which is employed in violating the law has always been essential.

It is obvious, indeed, that merely forfeiting the articles, while permitting the vehicle to be returned to its owner, cannot sufficiently deter offenders from attempting to export other articles without a license. Especially must this be so whenever the profit to be gained by unlawful exportation is high and the risk of detection is not great. The only effective method of preventing recurrent violations is, accordingly, to condemn the instrumentality used to perpetrate the offense. The importance of the sanction of forfeiture is illustrated by cases, differing but little from that now at bar, where the vehicle is owned by an alien non-

resident who is beyond the reach of our criminal laws and the persons driving the vehicle are his agents or employees. It is evident that in such cases criminal punishment of the agent and forfeiture of only the articles transported, without forfeiture of the transporting vehicle, must be an insubstantial weapon against the non-resident owner of the vehicle, who can make repeated attempts by the hands of many different agents to get the contraband goods across the border.

It is thus impossible to conclude that Congress in 1917 was not just as fully aware of these facts as were the Congresses which a hundred years earlier had passed other non-intercourse acts. The history of Espionage Act of 1917 plainly indicates they were.

II.

THE LEGISLATIVE HISTORY OF THE ACT SHOWS IT WAS INTENDED TO PROVIDE FOR THE FORFEITURE OF VEHICLES CONTAINING ARTICLES BEING UNLAWFULLY EXPORTED.

It is clear from the history of the Act that the plain general language of Sections 1, 3 and 4, as quoted, sufficiently authorizes the condemnation and forfeiture of all property involved, including the vehicles employed, without any resort to the special provision found in the last sentence of Section 1. That sentence was not even found in the Bill as originally prepared in the Department of Justice and submitted to the Sixty-fourth Congress. It was added only in the later

version subsequently introduced in the Sixty-fifth Congress.

The Espionage Act of 1917 as finally passed in the first session of the Sixty-fifth Congress was designated as H.R. 291, but the Bill originated in the Senate during the second session of the Sixty-fourth Congress. Title VI, the neutrality and export control provisions with which we are here concerned (Cf R. 14), was submitted by the Attorney General on the instructions of President Wilson as one of the fourteen Bills dealing with neutrality, revelation of defense secrets, espionage and kindred matters.[3] As originally reported to the Senate by the Judiciary Committee, it was designated S. 6811 of the Sixty-fourth Congress (54 Cong. Rec. 2819). In the form in which they were reported from Committee on February 8, 1917, Sections 1 and 4 of S. 6811, together with its title, expressly provided for the condemnation and forfeiture of the vessels or vehicles containing arms and munitions of war about to be illegally exported. With emphasis supplied to the pertinent language, the provisions read (54 Cong. Rec. 3416):

> An Act to authorize the seizure, detention, *and condemnation* of arms and munitions of war in course of exportation or designed to be exported or used in violation of the laws of the United States, *together with the vessels or vehicles in which the same are contained.*
>
> Sec. 1. Whenever, under any authority vested in him by law, the President of the United States

[3]See explanation of Senator Overman, 55 Cong. Rec. 1787.

by proclamation, or otherwise, shall forbid the shipment or exportation of arms or munitions of war from the United States to any other country, or whenever there shall be good cause to believe that any arms or munitions of war are being, or are intended to be employed or exported, * * * [the persons authorized hereby] may seize and detain any arms or munitions of war about to be so exported or employed *and the vessels or vehicles containing the same,* and retain possession thereof *until released, or disposed of as hereinafter directed.*

* * *

Sec. 4. Whenever the persons making *any seizure* under this chapter shall have applied for and obtained a warrant for the detention *of the property,* and the owner or claimant shall have filed a petition for its restoration as provided in this chapter, and upon the hearing and determination of said petition restoration shall have been denied, or where such owner or claimant shall have failed to file a petition for restoration, * * * the United States attorney for the district wherein it was seized, upon direction of the Attorney General, shall institute libel proceedings * * * *against said property* for condemnation, and if after trial and hearing of the issues involved *the property shall be condemned, it shall be disposed of by sale,* and the proceeds thereof, less the legal costs and charges shall be paid into the Treasury of the United States.

It is submitted that this provision for condemnation and forfeiture of the vehicles containing the articles

is clear and ample without the added final sentence of Section 1. But it is equally clear that the last added sentence was also intended by Congress to extend to the vehicles or vessels which are merely taken out of the United States with their cargo of contraband and are not themselves intended to be exported.

In the course of the Sixty-fourth Congress the original fourteen Bills were consolidated and S. 6811 became chapter 9 of S. 8148 (54 Cong. Rec. 3613). In the Sixty-fifth Congress the consolidated Bill was reintroduced in the Senate as S. 2 and as H. R. 291 in the House. In the Senate the neutrality and export control provisions became chapter 6 of S. 2 (55 Cong. Rec. 794). While the Senate Bill was under consideration, the Attorney General sent to the committee a proposed addition, relating to the control of exports generally. The reported debates show that one of the purposes of this addition was to help relieve a shortage of tin plate, which was being exported to various neutral countries. In secret sessions, however, it was disclosed that its fundamental purposes was to enable the United States to carry on economic warfare against neutral countries which were assisting the Germans by food and supplies.[4] At the time there appeared to be serious doubt as to whether these additional provisions could be incorporated into the pending Bills or would be so delayed that it would be necessary to enact them as a separate statute.[5] To meet this doubt and

[4]See explanation of Senator Overman, 55 Cong. Rec. 1787

[5]The Attorney General's proposal was adopted in time, however, and became Title VII of the Act (40 Stat. 225).

make some general export control available at the earliest possible moment, the Attorney General suggested that chapter 6, which then covered the control of only arms and munitions about to be exported, should be strengthened by a provision permitting the forfeiture of articles which should merely *appear to have been* about to be *unlawfully taken out* and broadened by adding "or other articles" as well as arms and munitions.

The suggestions were accepted, partly in the revised Bill as reintroduced, partly by committee amendment, and partly by conference amendment. The Senate, on April 18, 1917, adopted a text under which the language of Section 1 became (55 Cong. Rec. 794):

> Sec. 1. Whenever, under any authority vested in him by law, the President of the United States, by proclamation or otherwise, shall forbid the shipment or exportation of arms or munitions of war, *or other articles* the export of which is made unlawful by or under any statute, from the United States to any other country, or whenever there shall be good cause to believe that any arms or munitions of war or other articles the export of which is made unlawful, are being or are intended to be employed or exported in connection with a military expedition or enterprise forbidden * * * [the persons authorized hereby] may seize and detain any arms or munitions of war *or other forbidden property* about to be so exported or employed, *and the vessels or vehicles containing the same,* and retain possession thereof *until released or disposed of as hereinafter directed.* If upon the due inquiry, as hereinafter provided,

> the property seized *shall appear to have been about to be so unlawfully exported, used, or employed, the same shall be forfeited to the United States.* (Italics supplied.)

As a result of the exigencies of parliamentary procedure, when the House Bill, H. R. 291, came to the Senate, the latter substituted S. 2, including the quoted language, retaining only the designation H. R. 291 (55 Cong. Rec. 2014) and so adopted the Bill, which following slight modifications in conference, the Bill as adopted became law.[6]

One of the modifications introduced in conference, however, affected Section 1 of what had now become Title VI and is of outstanding significance here. For the expression "so unlawfully exported, used or employed", as contained in the added last sentence and in the corresponding clause of the first sentence, as passed by the Senate, the conference substituted the expression "so unlawfully exported, shipped from *or taken out of the United States.*" The reasons for the change which had been earlier recommended by the Attorney General, are not discussed in the conference reports nor in the debates. Its results for the meaning of the statute, however, are obvious. Exportation, as is well known, requires not only an intent to sever the articles to be exported from the mass of goods in the country from which the articles are being taken out but also an intent to make

[6]See Conference Reports H. Rep. 65 and 69 [Ser. vol. 7252] and 55 Cong. Rec. 3307, 3498, 3870.

them a part of the mass of goods in the country into which they are to be introduced. Cf. *United States v. Hill,* 34 F.(2d) 133 (1929, C.C.A. 2.) Obviously, this is not the case with the vehicles and vessels employed as instruments of the violation. Such vehicles or vessels are unlawfully taken out in the course of violating the Act; they are not exported. This new expression makes it certain that this special provision, like the general language of Sections 1, 3, 4 and 5, was intended to apply not only to the articles exported but also to vehicles or vessels unlawfully taken out while employed in containing them—objects which are, of course, not intended to be exported but, on the contrary, are "unlawfully taken out" with the intention of being returned to the United States and repeatedly used as the instrumentality of violations of the export control laws.

It is thus impossible to accept appellee's contention that Congress intended to restrict forfeiture to articles which appear to be about to be exported. The consideration of appellee's arguments confirms this view.

III.

NOTHING IN THE ACT LIMITS OR RESTRICTS ITS PLAIN GENERAL LANGUAGE SO AS TO EXCLUDE FROM FORFEITURE THE VEHICLES CONTAINING THE ARTICLES BEING EXPORTED.

Appellee can point to nothing anywhere in the Act itself purporting to except from the operation of the act's general provisions for condemnation and for-

feiture the vehicles which have been seized as containing articles being unlawfully exported. Appellee thus appears to put his sole reliance upon an attempt at interpreting the added final sentence of Section 1 as authorizing the forfeiture only of articles about to be exported. But that sentence as ultimately enacted provides:

> "If upon due inquiry as hereinafter provided, the property seized *shall appear to have been* about to be so unlawfully exported, shipped from, *or taken out* of the United States, *the same shall be forfeited* to the United States. (Italics supplied.)

Appellee seems to believe that since the sentence provides that property found to "appear to have been about to be unlawfully exported" shall be forfeited it implies that only such property may be condemned and forfeited and, since the intent is obviously not to export the vehicles containing the unlawful exports but rather to use them in repeated future violations, the vehicles are not property "about to be exported" and so should not be forfeited. But that interpretation disregards the words "or taken out of the United States" which were added to the sentence in the course of the conference proceedings on the Bill. Certainly the words were evidently intended to add something to the term "exported" else the conferees would not have seen fit to insert them into the language which had been adopted by the Senate. It is submitted that they were added to cover just such things as vehicles or vessels which are merely "unlawfully taken out of the United States" while

containing the articles about to be exported—things which typically, although they are not to be *exported,* are none the less to be *taken out,* later brought back, and repeatedly employed unlawfully as the instrumentalities of the contraband traffic.

Fairly construed the sentence does not imply that only property about to be exported and no other property shall be forfeited. In no event are its terms restrictive. It neither states nor implies that vehicles or vessels containing articles being exported shall not, in accordance with the first sentence of Section 1, be "disposed of as hereinafter directed" by condemnation and forfeiture as provided in the applicable provisions of Sections 3 or 4 subject to the court's power to restore them under the proviso of Section 5. It is merely an additional special provision for the forfeiture of property found to "*appear to have been about to be so unlawfully* exported, shipped from or *taken out* of the United States." (Italics supplied.) Nothing indicates that the language is intended to restrict the operation of the statute. It obviously has another purpose; that of broadening the Act. This provision for the forfeiture of property which is found to "*appear to have been about to be*" taken out represents a very distinct enlargement of the general provisions of the Act which apply only where either (a) there is actually an *attempt* to export or take out unlawfully, or (b) there is probable cause to believe that the articles "are *being* or are *intended to be* exported or taken out unlawfully." (Italics supplied.) Both seizure for an *attempt* to take out and for *probable cause* to be-

lieve there is an *intention* to take out requires the officer seizing to have specific information in advance of the seizure of a deliberate decision on the part of those in control of the property to employ it unlawfully. In both situations it is necessary to prove that *before* the seizure the officer had evidence of this *animus* on the part of those in control of the articles; a matter which is always difficult. The added provision of the last sentence for forfeiture of property which is *later* found to appear to have been about to be exported or taken out, involves no such difficult requirement. Even though the original seizure might have been invalid for want of probable cause, by virtue of this added provision it will suffice that the evidence produced *on the hearing* establishes that it *then* appears that it was about to be exported or taken out unlawfully.

Moreover, if appellee's contention that the last sentence defines the exclusive limits of the power to forfeit were accepted, the entire Act would become unworkable and the intention of Congress would be defeated. This special provision of the last sentence extends only to property which "*appears* to have been *about* to be" taken out. If interpreted in accordance with appellee's contention, not only would this added provision of Section 1 prohibit the forfeiture of the vehicles and vessels which contain articles being exported, as provided by the general language of the Act, but equally it would prohibit the forfeiture of the articles themselves once they had gone beyond the point where they were "*about* to be exported or taken out" and had reached the point

where they were actually "*being* exported or taken out". It might also be argued that in accordance with the last sentence the realities of the situation are to be completely disregarded and the *only* question held to be not whether there *was* a violation but what the *appearances* were.[7]

It is submitted therefore that appellee's contention should not be accepted but instead the Act should be given a reasonable interpretation calculated to give effect to the undoubted intention of Congress to prevent unlawful exportation. "A thing may be within a statute but not within its letter, or within its letter and yet not within the statute," said the Supreme Court in *Jones v. Guaranty Co.,* 101 U. S. 622, 626 (1879), "The intent of the lawmaker is the law." And, as this Court observed in *United States v. Manstad,* 134 F. (2d) 986, 988 (1943, C. C. A. 9), "Strictness of construction should not defeat the real objective of Congress."

Finally, appellee appears to urge that the forfeiture of the vehicle or vessel be regarded as a Draconian measure and lays stress upon the fact that he was not personally a participant, directly or indirectly, in the attempted smuggling. (Br. 4.) But the problem of interpretation here is like that in *United States v. Fischer,* 2 Cranch 358, 387-390 (1805) where a similiar attempt was made to

---

[7]This, amazing as it would seem, is the position actually adopted by Judge Holland in *The Cachalot III,* 60 F. Supp. at 528, where he says the question under the statute is not "whether the owner intended to export the lumber * * * but * * * whether the property seized shall *appear to have been* about to be so unlawfully exported * * *". (Italics supplied.)

narrow the general language of a statute and Chief Justice Marshall said (p. 390):

> "* * * if the intention of the legislature be expressed in terms which are sufficiently intelligible, to leave no doubt in the mind, when the words are taken in their ordinary sense, it would be going a great way, to say that a constrained interpretation must be put upon them to avoid an inconvenience which ought to have been contemplated in the legislature, when the Act was passed, and which in their opinion, was probably over-balanced by the particular advantages it was calculated to produce."

In any case no problem of such an inconvenience or harshness is presented by the case at bar. Congress was aware of the earlier embargo and non-intercourse acts and of the necessity of forfeiture of vehicles and vessels as a means of enforcement, but Congress was just as fully aware that the penalty of forfeiture, in some cases, might be inequitable and harsh. It accordingly added to Section 5 (40 Stat. 225; 22 U. S. C. 405) the proviso leaving to the discretion of the court whether or not the property condemned should be forfeited or, instead, should be restored to the owner or claimant upon his giving security against future violation.[8] Under this proviso appellee will

---

[8]It is ordinary legislative practice to provide for the forfeiture of vehicles and vessels used by servants and employees in the violation of the law although the master and owner is unaware of the wrong. See annotation 5 A.L.R. 213. It is equally common to authorize mitigation in such and many other circumstances where the owner can demonstrate his innocence. *United States v. One Ford Coach*, 307 U.S. 219, 226 (1939); see annotation 47 A.L.R. 1055; 61 A.L.R. 551; 73 A.L.R. 1087; 82 A.L.R. 607; 124 A.L.R. 288.

have full relief if he can but satisfy the court of his contention that he had no knowledge of the smuggling.

CONCLUSION.

It is therefore submitted that not only under the plain general language of the first sentence of Section 1 together with Sections 3 and 4 of the Act but also under the last sentence of Section 1, the Plymouth Truck here involved should be condemned and forfeited to the United States. Accordingly, appellant respectfully submits that the case should be remanded to the District Court with instructions to declare the vehicle forfeited to the United States and to take such further proceedings as may be required.

Dated, January 18, 1946.

Respectfully submitted,

FRANK E. FLYNN,
United States Attorney,
JOHN P. DOUGHERTY,
Assistant United States Attorney,
LEAVENWORTH COLBY,
Attorney, Department of Justice,
Attorneys for the United States, Appellant.